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In The

Supreme Court of the United States

Term, 1961

No. 285

KENDALL H. SHOYER and AGNES P. SHOYER,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
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v.

United States of America,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on May 16, 1961.

Opinions Below
Jurisdiction
Questions Presented

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania is not yet reported but is printed at pages 18a-19a of Appellants' Appendix in No. 13,521 of the court below. The opinion of the United States Court of Appeals for the Third Circuit is not yet reported but is printed in Appendix A hereto, pages 16-17.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 16, 1961 and is printed in Appendix B hereto, page 18. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

1. May a court enter summary judgment on the basis of assumed facts which are directly contrary to the only facts of record?

2. Are expenses incurred by a successful candidate seeking to retain a state judicial office non-deductible notwithstanding the 1948 amendment to the Internal Revenue Code?

STATUTES INVOLVED

The statutory provisions involved are the following provisions of the 1939 Internal Revenue:

§23(a)(1)(A), 56 Stat. 798, 819, 26 U.S.C. §23(a)(1)(A) (1952 ed.);

§23(a)(2) as amended by §121 of the Revenue Act of 1942, 56 Stat. 798, 819, 26 U.S.C. §23(a)(2) (1952 ed.);

§24(a)(1), 52 Stat. 464, 26 U.S.C. §24(a)(1) (1952 ed.) and

§48(d), 48 Stat. 680, 696, 26 U.S.C. §48(d) (1952 ed.)

In addition, there is involved the 1948 amendment of the 1939 Code, §1141(a), 63 Stat. 107, 26 U.S.C. §1141(a) (1952 ed.).

The above sections of these statutes are set forth in Appendix C to this petition, pages 19-20.

STATEMENT OF THE CASE

Petitioners, Judge Kendall H. Shoyer and Agnes P. Shoyer, his wife, brought this action against the respondent, United States of America, to recover an overpayment of federal income taxes for the calendar year 1953. Petitioners had filed a timely income tax return and paid

the tax shown to be due. The Commissioner of Internal Revenue disallowed some itemized deductions claimed by petitioners and assessed a deficiency.[1] Petitioners paid the assessment, filed a claim for refund, which was disallowed, and brought suit in the District Court. Petitioners and respondent both filed motions for summary judgment. The sole issue raised during the administrative proceedings and by the motions for summary judgment in the District Court was the propriety of the deductions claimed by petitioners as expenses incurred in carrying on a trade or business or incurred for the production of income. The District Court denied petitioners' and granted respondent's motion for summary judgment. The Court of Appeals affirmed.

The record in this case consists only of pleadings: the complaint and answer to it, petitioners' answer to respondent's request for admissions of fact and the uncontradicted affidavit of petitioner, Kendall H. Shoyer, attached to petitioners' motion for summary judgment.

These pleadings show that Kendall H. Shoyer was appointed by the Governor of the Commonwealth of Pennsylvania as a Judge of the Orphans' Court of Philadelphia County (Pennsylvania) on July 1, 1952 for the remainder of a term expiring January 4, 1954 (15a). As such he was entitled to and did receive a salary of $18,500 per year (15a). During the calendar year 1953 Kendall

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[1] Petitioners originally paid a tax of $3,547.66. The disallowed deductions totalled $1,347.64. The deficiency assessed was $418.10 plus interest of $30.91. Petitioners paid the full amount of the deficiency assessed and interest. The disallowed deductions are set forth in full at pages 10a-11a and 16a-17a of Appellants' Appendix in the court below. The deductions claimed were all expenses incurred in seeking election to judicial office.

H. Shoyer was a candidate for election to the same office for a further term of ten years to begin January 4, 1954 (15a).

The Philadelphia Bar Association, prior to the general election in November, 1953, conducted a plebiscite of the members of the Philadelphia Bar to ascertain the qualifications of sitting judges whose terms were about to expire. Judge Shoyer was overwhelmingly endorsed by the members of the Philadelphia Bar Association as being qualified for the office he then held (15a-16a).[2]

Under these circumstances Kendall H. Shoyer was then obligated to the Court and its members, to the attorneys of the Philadelphia Bar and to the parties with matters then pending and those with matters to be presented to the Orphans' Court of Philadelphia to take such steps as were ordinary and necessary for the further performance and carrying out of the functions of a judge of that Court (11a-13a, 16a). In the performance of this duty to seek election Judge Shoyer incurred certain modest expenses totalling $1,347.64, all of which were ordinary, reasonable, necessary and paid by him. These expenses included, among other items, statutory filing fees enabling him to be on the ballot, which were disallowed, as well as the filing fee for recording his commission after election, which was allowed (10a-12a, 16a-17a).

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[2] The "Sitting Judge Principle" is well established in Philadelphia County with a long history of success in retaining in office local sitting judges found qualified by the Bar Association and in bringing about the termination of service of sitting judges found not to be qualified. The results of the plebiscite in February, 1953 showed 1,882 ballots favorable to Kendall H. Shoyer, 340 unfavorable and 247 with no opinion (16a).

Kendall H. Shoyer successfully retained his office in the election of 1953, beginning a ten-year term on January 5, 1954 (17a). He has continuously and faithfully performed the duties of that office to the present time earning a salary of $18,500 per year until June 30, 1956 and $22,500 per year thereafter (17a).

On the above facts, uncontradicted and unchallenged by the respondent, the District Court denied petitioners' and granted respondent's motion for summary judgment and the Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

I. The summary judgment in the court below was premised on a finding of fact that the expenses deducted were not incurred in the performance of the functions of tht taxpayer's public office; this premise was directly contrary to the only facts of record; therefore, the summary judgment granted was in violation of Federal Rule of Civil Procedure 56 and the decisions of this Court and every Court of Appeals.

Federal Rule of Civil Procedure 56 provides for summary judgment only where there is "no genuine issue as to any material fact." This Court and the Courts of Appeals of every circuit have held that summary judgment may not be granted where to do so requires that a court determine an issue of fact or assume a fact.[3] The preservation of this construction of a very important rule of

[3] *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620 (1944); *Peckham v. Rourico Corp.*, 171 F. 2d 653 (1st Cir. 1948); *Landy v. Silverman*, 189 F. 2d 80 (1st Cir. 1951); *Doehler Metal Furniture Co. v. United States*, 149 F. 2d 130 (2d Cir. 1945); *Krieger v. Ownership Corp.*, 270 F. 2d 265 (3d Cir. 1959); *Pierce v. Ford Motor Co.*, 190 F. 2d 910 (4th Cir. 1951); *Volunteer State Life Ins. Co. v. Henson*, 234 F. 2d 535 (5th Cir. 1956); *Begnaud v. White*, 170 F. 2d 323 (6th Cir. 1948); *M. Snower & Co. v. United States*, 140 F. 2d 367 (7th Cir. 1944); *Traylor v. Black, Sivalls & Bryson, Inc.*, 189 F. 2d 213 (8th Cir. 1951); *Lane Bryant v. Maternity Lane, Ltd.*, 173 F. 2d 559 (9th Cir. 1949); *Avrick v. Rockmont Envelope Co.*, 155 F. 2d 568 (10th Cir. 1946); *Dewey v. Clark*, 180 F. 2d 766 (D.C. Cir. 1950).

civil procedure is a preservation of the right to trial by jury itself. To permit a judgment on the pleadings against a party where the resolution of a factual issue in his favor would entitle him to judgment in his favor deprives that party of the trial to which he is entitled. The decision in the present case is in direct conflict with these principles.

There has been and could be no dispute that expenses incurred in performing the functions of a public office are deductible as business expenses: §§23(a)(1)(A) and 48 (d) of the Code. The only question in the present case was whether the expenses deducted by Judge Shoyer were incurred in the performance of one of the functions of his office. The affirmative answer to this question of fact appears twice in the record of this case: first, in Judge Shoyer's affidavit in support of petitioners' motion for summary judgment (16a) and secondly, in petitioners' answer to respondent's request for admissions of fact where respondent unsuccessfully sought to establish the contrary fact (11a-13a). A negative answer to the question does not appear anywhere in the record nor does the record contain any fact from which a negative answer could be inferred.

In affirming the judgment of the District Court, the Court of Appeals said (p. 17): "Nor do we think that the fact that the taxpayer had a favorable endorsement in a plebiscite by the Philadelphia Bar Association imposes any duty on him to pay out money in running for office. At most it gives him a favorable recommendation to the voting public by an organization which knows more about his work than the public does." This statement is nothing more than a rejection by the court below of the facts of record which are all to the contrary and a substi-

tution of the court's own assumption of fact, which is without a single shred of evidence to support it.[4] The court below may not, as it did, assume that the facts are other than the record shows them to be.[5] The far reaching effects of permitting a court to grant summary judgment by substituting its assumption of fact for the facts of record is in conflict with the federal rules of civil procedure and all decisions interpreting those rules, is a concept totally foreign to our system of jurisprudence and is a precedent jeopardizing the very foundation of the right to trial by jury.

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[4] This reasoning of the court below does not purport to answer the question of whether the expenses were deductible under §23(a)(2) as having been incurred in an effort to produce income: see pages 10 and 13-14 of this petition. It suggests, without stating, the conclusion that the expenses must be considered to be personal and non-deductible; see 26 U.S.C., §24(a)(1).

[5] See *Luther Ely Smith*, 3 T. C. 696, 703 (1904) where contributions by a lawyer to the Missouri Institute for the Administration of Justice, in support of the "Missouri Plan" for selecting judges (a program endorsed by the St. Louis Bar Association), were found to be deductible business expenses where the testimony of witnesses showed that the administration of justice is the business of lawyers and the measure of their professional success depends upon the integrity and efficiency of those processes. If the administration of justice is the business of lawyers, it is even more so the business of judges. The mere fact that Judge Shoyer was willing to contribute his services as well as his money to the administration of justice is no reason for denying him a deduction on his federal income tax return for the money he actually expended.

II. The decision of the court below was based upon the decision of this Court in McDonald v. Commissioner which, since the 1948 amendment to the Internal Revenue Code, is no longer a controlling authority.

The decisions of the District Court and Court of Appeals were in reliance upon the decision of this Court in *McDonald v. Commissioner*, 323 U. S. 57 (1944), affirming 139 F. 2d 400 (3d Cir. 1943), affirming 1 T.C. 738 (1943). In that case an unsuccessful candidate for judicial office was held not to be entitled to deduct his campaign expenses in an opinion written by Justice Frankfurter speaking for himself, Justices Stone, Roberts and Jackson. That opinion reviewed and resolved the merits of the controversy against the taxpayer and concluded with a discussion of the principle enunciated in *Dobson v. Commissioner*, 321 U. S. 281 (1943), stating that the Court "should not be inclined to displace the views of the Tax Court with our own" (323 U. S. 57, 64). Justice Rutledge concurred in the result. A dissenting opinion was written by Justice Black and Justices Reed, Douglas and Murphy joined in the dissent. The conclusion reached by the four dissenting Justices was that expenses incurred in seeking election could be deductible under §23(a)(2) of the Code as having been incurred in an effort to produce income. The dissenting opinion also referred to the *Dobson* case and concluded with the statement (323 U. S. 57, 71):

> "So long as campaign expenses spent by candidates are legitimate, ordinary, and necessary, I am unwilling to assume that Congress intended by the 1942 Act to discriminate against the thousands of state

officials subject to federal income taxes. The language Congress used literally protects petitioner's right to a deduction; nothing in the legislative history indicates an intent to deny it. Certainly there are abuses in campaign expenditures. But that is a problem that should be attacked squarely by the proper state and federal authorities, and not by strained statutory construction which permits a discriminatory penalty to be imposed on taxpayers who work for the states, counties, municipalities, or the federal government. I think we should reverse and remand this cause to the Tax Court with instructions to pass upon the factual questions which it did not previously determine."

Whether or not the *McDonald* case was correctly decided in 1944 and whether or not the majority opinion was based directly upon the principles described in the *Dobson* case[6] there can be no question but that the *McDonald* case was resolved in the climate of judicial acceptance of the rule that federal courts should not displace the views of the Tax Court with their own.[7] That

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[6] The court below said (p. 17):

"It is true that the *McDonald* case was decided when the *Dobson* rule was in effect. *Dobson v. Commissioner*, 320 U. S. 489 (1943). But the question in the *McDonald* case was not one which *Dobson* concerned in any way whatever."

The discussion of the *Dobson* case in the Supreme Court opinion suggests the contrary. In any event only this Court can decide whether the *Dobson* rule affected the *McDonald* outcome "*in any way whatever*".

[7] The majority in *McDonald* immunized the federal courts from entering the "quagmire of particularities" found in tax cases. That quagmire included cases holding that an employee can deduct as trade or business expenses or expenses incurred in

principle was eliminated by Congress as an acceptable standard of judicial review in tax cases by the 1948 Amendment to the 1939 Code, §1141(a), 26 U.S.C. §1141 (a) (1952 ed.). The legislative history[8] of the 1948 Amendment clearly reveals the specific intention of Congress to end the philosophy of judicial review of tax cases illustrated by the *Dobson* case when that Amendment provided:

> "The Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . *in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury* . . ." (Emphasis added.)

In the present case the District Court said: "This case is controlled by the case of *McDonald v. The Com-*

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producing income all the ordinary and necessary expenses paid maintaining and demonstrating to his corporate employer continued physical qualifications for a present position of employment: see, for example, *Reginald Denny*, 33 B.T.A. 738 (1935); *Charles Hutchison*, 13 B.T.A. 1187 (1928), and Rev. Rul. 58-382, 1958-2 Cum. Bull. 59. The expenses deducted by Judge Shoyer were incurred in successfully demonstrating to the Philadelphia Bar Association and the public the continued maintenance of intellectual and moral qualifications for continued service as a judge. Any distinction in the two situations should be resolved in favor of the public official rather than the employees of private industry.

[8] See S. Rep. No. 1559; 80th Cong., 2d Sess. 2 (1948): "One of the changes proposed by the House of Representatives with respect to the Tax Court provided that Tax Court decisions should be reviewable on appeal to the same extent as similar decisions of the District Courts. This in effect repeals the contrary rule laid down in *Dobson v. Commissioner of Internal Revenue* (320 U. S. 489). This proposal met with unanimous approval at the hearings on the bill held by your committee. It is recommended that the House amendment be retained."

missioner of Internal Revenue" (18a) and the court below said "With all sympathy for a fellow judge who, unlike a federal judge, has to seek re-election, we do not think this question is open. The compelling authority is *McDonald v. Commissioner* . . ." (p. 17). While the courts below could not, of course, be expected to review the question of the correctness of the decision in the *McDonald* case this Court can. Moreover, since the *McDonald* decision, Congress, by its 1948 Amendment, has drastically changed the duty of the federal courts in reviewing tax cases. Even if correct in 1944, the rule set forth in the majority opinion in the *McDonald* case has not been the law since 1948.[9] The perpetuation of the rule of the *McDonald* case is in conflict with the intention of Congress that the merits of tax questions be reviewed by the federal courts unhampered by any conscious or subconscious presumption that Tax Court opinions or philosophies are correct. The legal issue of the propriety of deducting reasonable expenses incurred in seeking elec-

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[9] The problem of deductibility of fees paid to employment agencies has, over the years, caused conflicting rulings by the Commissioner: compare O.D. 579, 1920 Cum. Bull. 130, Rev. Rul. 60-158, 1960-1 Cum. Bull. 140, Rev. Rul. 60-223, 1960-1 Cum. Bull. 57. Under the Commissioner's latest ruling such fees are now deductible. In regard to the position of judge it is elementary to state that there were only two organizations comparable to commercial "employment agencies", i.e., the Democratic and the Republican parties. The mere fact that payments are made to a political party does not prevent their deductibility so long as the expenditures serve the interests and business of the taxpayer seeking to deduct them: *Denise Coal Co.*, 29 T.C. 528 (1957); Rev. Rul. 56-343, 1956-2 Cum. Bull. 115. The expenses incurred by Judge Shoyer did serve his business interest and resulted in his election to an income producing job for at least 10 years.

tion to public office is of continuing national concern. The provisions of §23(a)(2) of the 1939 Code, in effect in 1948 and controlling the present case, are identical with the provisions of §212 of the 1954 Code. The result in the present case affects past, present and future candidates for public office. The decision is of extreme importance to all candidates, the public they serve and the future of democracy itself.

CONCLUSION

The impact of the decision of the court below on both the procedural and substantive issues far transcends the consequences to the parties in this particular litigation. Permitting summary judgment on judicially assumed facts which are contrary to the facts of record violates the basic principle underlying the American judicial system which provides an inviolate right to a litigant to have a trial on the facts as they are alleged by him. The denial of a deduction for expenses incurred in an election which are legitimate in their entirety and necessary for the production of taxable income through retention of public office is contrary to the language of the Internal Revenue Code, the intention of Congress in adopting the 1948 Amendment to the Code and to our democratic philosophy. The denial of the deduction may or may not have been appropriate at the time of this Court's decision in *McDonald v. Commissioner,* a case decided by a 5 to 4 vote in the atmosphere of the judicial philosophy that federal courts should not displace the views of the Tax Court with their own. The denial of the deduction now,

in the light of the 1948 Amendment to the Code, is no longer necessary or proper. The denial of deductions for expenses incurred in an election is a discriminatory penalty imposed against all taxpayers who work for states, counties, municipalities and the federal government. This discrimination is against the class of taxpayers entitled to the greatest, not the least, consideration. The wide need for a definitive answer to this important problem in the administration of the federal income tax law as it existed in 1944 justified the bringing of the *McDonald* case to this Court. The same problem involving the federal income tax law, as it now exists, justifies similar consideration.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

United States Court of Appeals
For the Third Circuit

No. 13,521

Kendall H. Shoyer and Agnes P. Shoyer,
Appellants

v.

United States of America

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued May 4, 1961

Before Goodrich and Staley, Circuit Judges; and Forman, Senior Circuit Judge.

OPINION OF THE COURT

(Filed May 16, 1961)

Per Curiam:

This is an appeal from a judgment for the Government in an action by a taxpayer to recover taxes which

he paid following an assessment for a deficiency. The taxpayer (with his wife joined because they made a joint return) deducted from his 1953 income tax a sum which he had spent as a candidate for reelection to judicial office. He was appointed for an interim term by the Governor and under Pennsylvania law ran for election the next year. The expenditure was reasonable in amount, in fact, very modest. There is no question as to the accuracy of the deduction claimed.

With all sympathy for a fellow judge who, unlike a federal judge, has to seek reelection, we do not think this question is open. The compelling authority is *McDonald v. Commissioner*, 323 U. S. 57 (1944). It is true that the *McDonald* case was decided when the *Dobson* rule was in effect. *Dobson v. Commissioner*, 320 U. S. 489 (1943). But the question in the *McDonald* case was not one which *Dobson* concerned in any way whatever. The tax problem, therefore, is the same now as it was at the time *McDonald* was decided. Nor do we think that the fact that the taxpayer had a favorable endorsement in a plebiscite by the Philadelphia Bar Association imposes any duty on him to pay out money in running for office. At most it gives him a favorable recommendation to the voting public by an organization which knows more about his work than the public does.

The judgment of the district court will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

United States Court of Appeals
For the Third Circuit

No. 13,521

Kendall H. Shoyer and Agnes P. Shoyer,
Appellants

vs.

United States of America

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Goodrich and Staley, Circuit Judges; and Forman, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:
IDA O. CRESKOFF
Clerk

May 16, 1961

APPENDIX C

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a)(1)(A) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *

(a)(2) In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the management, conservation, or maintenance of property held for the production of income.

SEC. 24. ITEMS NOT DEDUCTIBLE.

In computing net income no deduction shall in any case be allowed in respect of:

(a)(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x); * * *

SEC. 48. DEFINITIONS.

When used in this chapter—

* * * * * * * *

(d) The term "trade or business" includes the performance of the functions of a public office.

SEC. 1141. COURTS OF REVIEW.

(a) The courts of appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final, except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of title 28 of the United States Code.

SUPREME COURT U. S.

AUG 31 1961

JAMES R. BROWNING, Clerk

No. 285

In the Supreme Court of the United States

OCTOBER TERM, 1961

KENDALL H. SHOYER and AGNES P. SHOYER,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The memorandum and order of the district court (R. 18a-19a)[1] are not officially reported. The opinion of the court of appeals (Pet. 16-17) is reported at 290 F. 2d 817.

JURISDICTION

The judgment of the Court of Appeals was entered on May 16, 1961 (Pet. 18). The petition for a writ

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[1] Record references are to the appendix to the appellants' brief in the Court of Appeals.

of certiorari was filed on August 4, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether expenses incurred by a judge in connection with his successful campaign for election to judicial office, the major portion of which were contributions to a political party's campaign fund, are deductible for federal income tax purposes.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1939:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Sec. 121(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.* — All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; * * *.

* * * *

(2) *Non-trade or non-business expenses.* —In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production or collection of income, or for the

management, conservation, or maintenance of property held for the production of income.

* * * *

(26 U.S.C. 1952 ed., Sec. 23(a).)

SEC. 48. DEFINITIONS.

When used in this chapter—

* * * *

(d) *Trade or Business.*—The term "trade or business" includes the performance of the functions of a public office.

(26 U.S.C. 1952 ed., Sec. 48(d).)

Treasury Regulations 118 (1939 Code):

SEC. 39.23(a)-15 *Nontrade or nonbusiness expenses.* * * *

* * * *

(f) Among expenditures not allowable under section 23(a)(2) are the following: * * * campaign expenses of a candidate for public office, * * *.

* * * *

STATEMENT

The taxpayer, petitioner Kendall H. Shoyer,[2] was appointed by the Governor of Pennsylvania as a judge of the Orphans' Court of Philadelphia County, Pennsylvania, on July 1, 1952, for the remainder of a term expiring on January 4, 1954 (R. 2a, 15a). In November 1953, he was elected a judge of that court for a full ten-year term beginning January 5, 1954 (R. 2a-

[2] The other petitioner, taxpayer's wife, is a party only because she and her husband filed a joint return.

3a, 17a). In connection with his election campaign for that office, the taxpayer incurred expenses of $1,347.64, of which approximately $1,200 constituted contributions to a political party, and the balance such items as filing fees, messenger service and printing (R. 10a-13a, 16a-17a). In their joint federal income tax return for 1953, the taxpayer and his wife claimed a deduction for these campaign expenses (R. 3a, 9a, 17a). The District Director disallowed the deduction on the ground that campaign expenses were not deductible, and assessed a deficiency (R. 3a, 9a). The taxpayer paid the deficiency and filed suit for refund (*ibid.*).

Both the government and the taxpayer moved for summary judgment (R. 14a-18a). The district court granted the government's motion and denied that of the taxpayer (R. 18a-19a). The court of appeals affirmed, *per curiam*, on the authority of *McDonald* v. *Commissioner*, 323 U.S. 57 (Pet. 16-17).

ARGUMENT

1. The court below correctly held that the taxpayer's expenses incurred in connection with his successful campaign for election as a judge were not deductible either as ordinary and necessary business expenses under Section 23(a)(1)(A) of the 1939 Code, or as ordinary and necessary expenses for the production of income under Section 23(a)(2) of the Code. As the court below ruled, this issue is controlled by *McDonald* v. *Commissioner*, 323 U.S. 57.

The taxpayer in *McDonald* had been appointed to serve the unexpired term of a state court judgeship, on the understanding that he would be a candidate

for a full term in the next general election. In order to obtain the support of his political party in such election, however, he was required to pay an assessment made by the party. He also incurred other campaign expenses such as advertising, printing, travel, etc. His election campaign was unsuccessful. This Court, upholding the decision of the Tax Court, held that his campaign expenses were properly disallowed.

While there was no opinion of the Court in the *McDonald* case, the opinion of Mr. Justice Frankfurter (in which Mr. Chief Justice Stone, Mr. Justice Roberts and Mr. Justice Jackson concurred [3]) cogently explained why the campaign expenses were not deductible. They were not deductible under Section 23 (a) (1) (A) as ordinary and necessary business expenses because, although the taxpayer could "deduct all expenses that related to the discharge of his functions as a judge," "his campaign contributions were not expenses incurred in being a judge but in trying to be a judge for the next ten years" (p. 60). They were not deductible under Section 23(a) (2) as expenses for the production of income, since the latter provision (adopted by a 1942 amendment to the Code) was designed to permit the deduction of expenses of "profitable transactions not covered by the statutory concept of 'business' income. But of course earnings from 'the performance of the functions of a public office' had specifically been so covered. * * * [t]he diffi-

[3] Mr. Justice Rutledge concurred in the result. Mr. Justice Black dissented, in an opinion in which Mr. Justice Reed, Mr. Justice Douglas and Mr. Justice Murphy joined.

culty is not that petitioner's expenditures related to 'non-business' income, and thus were excluded from the legislative scheme before the 1942 Amendment, but that they were not incurred in 'carrying on' his 'business' of judging. * * * [T]he act of 1942 in no wise affected the disallowance of campaign expenses as consistently reflected by legislative history, court decision, Treasury practice and Treasury regulations" (p. 62).

Since the *McDonald* case, Congress has given no indication that it disagreed with, or wished to change, the rule that political campaign expenses are not deductible. On the contrary, Congress in 1954 reenacted, in substantially the same form as in the 1939 Code involved in *McDonald*, the provisions governing the deduction of business and income-producing expenses. Internal Revenue Code of 1954, Sections 162 (a), 212(1). Furthermore, the Treasury Regulations have continued to provide, as they have done for many years, that "campaign expenses of a candidate for public office" are not deductible.—Treasury Regulations 118 (1939 Code), Section 39.23(a)-15, *supra*, p. 3; Treasury Regulations on Income Taxes (1954 Code), Section 1.212-1(f).

The cases since *McDonald* that have considered the issue have uniformly held campaign expenses not deductible. In *Mays* v. *Bowers*, 201 F. 2d 401 (C.A. 4), certiorari denied, 345 U.S. 969, the court upheld the disallowance of the expenses of a successful campaign for election to a county council. In an opinion by Chief Judge Parker, which relied upon *McDonald*, the court stated (p. 403):

> The salary of an office is paid for the performance of the duties of the office. Expenses incurred in such performance are proper deductions from income, but not expenses incurred in campaigning for the office. Expenses of barbecues, party campaign contributions, hiring of automobiles and pay of poll workers are certainly not expenses incurred in earning the salary of the office. If such deductions should be allowed, the government to the extent of the reduction in taxes thereby obtained would be paying the campaign expenses of the taxpayer, and would be paying a larger portion in the case of a wealthy taxpayer in the high income brackets than of a poor taxpayer in the lower brackets. In cases where the expenses of the campaign equalled or exceeded the salary of the office, which has been known to occur, the taxpayer would pay no tax upon his salary at all. Not until Congress unequivocally allows deductions which are fraught with the possibility of such absurd consequences should the courts sanction them.

In *Harry D. Morcland*, ¶ 60,178 P-H Memo TC, the Tax Court last year upheld the disallowance of the expenses of an unsuccessful campaign for election to Congress.

The petitioners urge (Pet. 10-14), however, that the rationale of *McDonald* was that, under the rule of *Dobson* v. *Commissioner*, 320 U.S. 489, this Court merely refused to disturb the decision of the Tax Court; and that in view of the 1948 Amendment to the Code which overturned the *Dobson* rule (62 Stat. 991, 26 U.S.C. 1952 ed., 1141(a)), the *McDonald*

decision is no longer controlling. But the reliance in *McDonald* upon the *Dobson* rule was merely an additional basis for the conclusion that the campaign expenses were not deductible; the primary reliance was on the stautory provisions. The 1948 change in the *Dobson* principle cast no doubt upon the reasoning in Mr. Justice Frankfurter's opinion which showed that campaign expenses are neither ordinary and necessary business expenses nor ordinary and necessary expenses for the production of income.

In these circumstances, there is no occasion for this Court to reexamine *McDonald*, as the taxpayer suggests (Pet. 12). He points to no new circumstances or changed conditions that throw any doubt upon its correctness. If any change is to be made in the settled rule that campaign expenses are not deductible, that is a matter for Congress rather than for this Court.

2. The petitioners also contend (Pet. 7-9) that the district court improperly granted the government's motion for summary judgment because there was an issue as to a material fact, namely, "whether the expenses deducted by Judge Shoyer were incurred in the performance of one of the functions of his office" (Pet. 8). They argue that, since a referendum taken by the Philadelphia Bar Association prior to the 1953 election showed that a majority of those voting believed that the taxpayer was qualified to continue as a judge of the Orphans' Court (R. 12a-13a), he then had a "duty to seek election" (Pet. 5). But the taxpayer's belief that he had a moral duty to run for office did not change the character of his

campaign expenses. The taxpayer admitted (R. 12a) that all of those expenses were incurred as a candidate for election. As a matter of law, therefore, the expenses were not deductible; and the claim that the taxpayer had a duty to run for the office did not raise any material factual issue that precluded the grant of summary judgment.

CONCLUSION

The decision of the court of appeals is correct and is in accord with the controlling decision of this Court and the decisions of the lower courts. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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